Filed 8/27/19 P. v. Chavez CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN CHAVEZ, Defendant and Appellant.	B282839 (Los Angeles County Super. Ct. No. TA091961)

APPEAL from a judgment of the Superior Court of Los Angeles County, William C. Ryan and Arthur M. Lew, Judges. Affirmed in part; reversed in part and remanded with directions.

Juliana Drous, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, William H. Shin and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

Adrian Chavez appeals from a judgment entered after he was resentenced for second degree murder in light of the Supreme Court's holding in *People v. Chiu* (2014) 59 Cal.4th 155, 167 (*Chiu*). In 2008 a jury convicted Chavez of the first degree murder of Salvador DeAvila, who was shot by Chavez's fellow gang member, Luis Jesus Rodriguez. We affirmed Chavez's conviction. (*People v. Chavez* (May 9, 2011, B216450) [nonpub. opn.] (*Chavez I*).)

On June 2, 2014 the Supreme Court held in *Chiu* that the natural and probable consequences theory of aiding and abetting a crime cannot be the basis for convicting a defendant of first degree murder. (*Chiu, supra*, 59 Cal.4th at p. 167.) The following year Chavez filed a petition for a writ of habeas corpus with the Supreme Court seeking relief from his first degree murder conviction pursuant to *Chiu*. The Supreme Court issued an order to show cause returnable in the superior court. In briefing in the superior court, the People conceded *Chiu* error, and argued the appropriate remedy was reduction of the conviction to second degree murder. Chavez contended he was entitled to a new trial as to second degree murder, and subsequently filed a motion for a new trial. The superior court granted Chavez's habeas corpus petition, vacated Chavez's conviction for first degree murder, and ordered that the People could either accept a reduction of the conviction to second degree murder or retry Chavez for first degree murder under a legally valid theory. After the People elected to accept a reduction to second degree murder, the trial court denied Chavez's motion for a new trial, reduced Chavez's conviction to second degree murder, and resentenced him to 55 years to life.

Chavez contends on appeal that, by denying him a new trial, the trial court violated his Sixth Amendment right to a jury trial and the federal and state constitutional prohibitions against double jeopardy.[1] Chavez further contends there was insufficient evidence to support a second degree murder conviction under the natural and probable consequences theory.

In his reply, Chavez asserted we should vacate his conviction and remand for resentencing in light of Senate Bill No. 1437 (2017-2018 Reg. Sess.), which became effective January 1, 2019. The bill amended Penal Code sections 188 and 189 to limit who can be liable for murder under a theory of felony murder or the natural and probable consequences doctrine. We agree with the People that Chavez must first petition the trial court for relief under Senate Bill No. 1437 before raising this issue on appeal.

Chavez contends in his supplemental brief, the People concede, and we agree remand is necessary to allow the trial court to exercise its discretion whether to impose the firearm enhancement imposed pursuant to Penal Code[2] section 12022.53, subdivisions (d) and (e)(1).

We affirm the judgment of conviction, but remand for resentencing for the trial court to decide whether to strike the firearm enhancement.

---

[1] We initially dismissed Chavez's appeal as taken from a nonappealable order. However, the Supreme Court granted Chavez's petition for review, and directed this court to vacate the dismissal order and to consider whether to reinstate the appeal. On April 12, 2018 we reinstated Chavez's appeal.

[2] All further statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

The information charged Chavez with the murder of Salvador DeAvila. (§ 187, subd. (a).) The information alleged that in commission of the murder a principal personally used a firearm (§ 12022.53, subds. (b), (e)(1)); a principal personally and intentionally discharged a firearm (§ 12022.53, subds. (c), (e)(1)); and a principal personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (d), (e)(1)). The information further alleged Chavez committed the murder for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)); and Chavez suffered a prior conviction of a violent or serious felony under the three strikes law (§§ 667, subds. (b)-(i), 1170.12) and two prior felony convictions for which he served separate prison terms within the meaning of section 667.5, subdivision (b).

B. *The Evidence at Trial*[3]

On the night of June 24, 2007, DeAvila drove into the parking lot of Tam's Burgers in Paramount with Jose Maszano, Antonio Palomares, and Fausto Rojo. DeAvila dropped the three men off at the parking lot and drove in to find a parking space. As Maszano, Palomares, and Rojo walked into the parking lot, a white BMW almost hit Maszano. Yashie Navarro was driving the BMW. Maszano, who was intoxicated, briefly argued with

---

[3] Our summary of the evidence is taken from our opinion in *Chavez I, supra*, B216450.

Navarro. Maszano then leaned on the BMW's rear bumper and began talking on his cell phone. Navarro told Maszano to "get the fuck off his car." Maszano said "okay" and walked away.

Chavez then walked up to Maszano and told him, "This is Paramount Varrio, this is my Varrio. Get the fuck out of here." Chavez identified himself as "Evil." Maszano responded, "[W]e ain't going nowhere." Chavez punched Maszano on the side of the chin and knocked him unconscious. Chavez then reached for Maszano's cell phone and went through Maszano's pockets.

Palomares tried to push Chavez away from Maszano. Another man approached Palomares and said something like, "[D]o you know who he is?" or "[D]on't be touching him" or "[D]on't be touching Evil." The man then hit Palomares in the nose causing him to lose his contact lens. Palomares started to throw punches to defend himself.

DeAvila left his car and headed toward the fight to help his friends. Rodriguez, later identified as a member of Chavez's gang, shot DeAvila. DeAvila collapsed and fell to the ground. Rodriguez continued shooting at DeAvila. DeAvila died after receiving six gunshot wounds, including a shot to the head.

Detective Gabriela Herrera testified as a gang expert. She stated the Paramount Varrio 13 gang consisted of approximately 100 members who engaged in vandalism, robberies, assaults, and murders. Detective Herrera testified both Chavez and Rodriguez were members of the Paramount Varrio 13 gang and had numerous gang tattoos. Tam's Burgers was within the Paramount Varrio 13 gang territory. Based on a hypothetical mirroring the facts of the case, Detective Herrera testified the crime was likely committed for the benefit of a criminal street gang.

C. *The Verdict and Sentence*

The jury convicted Chavez of the first degree murder of DeAvila (§ 187, subd. (a)), and found true the special allegations a principal personally used a firearm (§ 12022.53, subds. (b), (e)(1)) and personally and intentionally discharged a firearm causing death (§ 12022.53, subds. (d), (e)(1)). The jury also found true Chavez committed the offense for the benefit of a criminal street gang. (*Chavez I, supra*, B216450.)

Following the verdict, Chavez admitted the special allegations he suffered a prior violent or serious felony conviction under the three strikes law (§§ 667, subds. (b)-(i), 1170.12) and served two prior prison terms within the meaning of section 667.5, subdivision (b). The trial court sentenced Chavez to an aggregate term of 75 years to life. (*Chavez I, supra*, B216450.)

D. Chavez I

Chavez contended on appeal there was insufficient evidence to support the jury's verdict for first degree murder under the natural and probable consequences doctrine; his trial counsel was ineffective; and the trial court committed judicial misconduct. We affirmed, explaining the evidence supported "a finding that the shooting was a natural and probable consequence of the assault and attempted robbery of Maszano" because Chavez "knowingly participated in a fight with Maszano that escalated into a deadly shooting by one of [Chavez's] fellow gang members." (*Chavez I, supra*, B216450.)

E. *Postconviction Proceedings*

1. *Chavez's petition for relief under* Chiu

In 2014 the Supreme Court held in *Chiu* that the natural and probable consequences theory of aider and abettor liability cannot support a conviction of first degree premeditated murder. (*Chiu, supra*, 59 Cal.4th at p. 167.) On June 15, 2015 Chavez filed a petition for a writ of habeas corpus in the Supreme Court in which he raised numerous claims, including that he was entitled to relief under *Chiu* because he was convicted of first degree murder as an aider and abettor under the natural and probably consequences theory. In their informal response, the People conceded Chavez was entitled to relief under *Chiu*. On March 9, 2016 the Supreme Court issued an order to show cause returnable in the superior court as to "why [Chavez] is not entitled to relief" under *Chiu*. In response to the order, the People filed a letter[4] in which they conceded Chavez's conviction for first degree murder must be reversed because "the sole theory of [Chavez's] liability for first degree premeditated murder was as an aider and abettor under the natural and probable consequences doctrine." The People requested they be allowed to accept a reduction of the conviction to second degree murder. Chavez argued in his traverse that he was entitled to a new trial, rather than a reduction of the conviction to second degree murder, because "the evidence does not support the use of the natural and probable consequences theory for any purpose."

On September 29, 2016 the superior court[5] granted Chavez's petition, vacated Chavez's first degree murder

---

[4] The People filed a letter stating their position in lieu of a return.

[5] Judge William C. Ryan

conviction, and instructed the People they "may either accept a reduction of the conviction to second degree murder, or elect to retry [Chavez] for first degree murder under a legally valid theory within 60 days." The superior court set the matter for resentencing.

2. *Chavez's motion for new trial*

On November 3, 2016 Chavez filed a motion for new trial in which he argued he could not be convicted of murder based on the natural and probable consequences theory because he was the perpetrator of the target offenses (assault and robbery), not an aider and abettor. In their opposition the People argued Chavez was properly convicted of second degree murder because the shooting was reasonably foreseeable, and a natural and probable consequence of the gang confrontation.

3. *Modified judgment and sentence*

On May 18, 2017, after a hearing, the trial court[6] denied Chavez's motion for a new trial and modified the verdict to reflect a conviction of second degree murder. The court sentenced Chavez on the murder count to 15 years to life, doubled under the three strikes law, plus a consecutive term of 25 years to life for the firearm enhancement (§ 12022.53, subds. (d) & (e)(1)). The court imposed, but stayed, a 10-year enhancement for the gang allegation. The court sentenced Chavez to an aggregate term of 55 years to life.[7]

---

[6] Judge Arthur M. Lew.

[7] Although the record does not reflect whether the trial court exercised its discretion to strike the prior prison term enhancements under section 667.5, subdivision (b), we presume it

Chavez timely appealed.

DISCUSSION

A. *The Trial Court Properly Reduced Chavez's Conviction to Second Degree Murder*

1. *Aider and abettor liability*

A criminal defendant may be convicted of a crime either as a perpetrator or as an aider and abettor. (§ 31.) "An aider and abettor can be held liable for crimes that were intentionally aided and abetted (target offenses); an aider and abettor can also be held liable for any crimes that were not intended, but were reasonably foreseeable (nontarget offenses). [Citation.] Liability for intentional, target offenses is known as 'direct' aider and abettor liability; liability for unintentional, nontarget offenses is known as the ""natural and probable consequences' doctrine""" (*In re Loza* (2018) 27 Cal.App.5th 797, 801; accord, *Chiu, supra*, 59 Cal.4th at p. 161 [""A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime."""].)

A direct aider and abettor acts "'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the [target] offense.'" (*Chiu, supra*, 59 Cal.4th at p. 161.) An aider and abettor is liable for the nontarget offense under the

---

did because the court had previously exercised its discretion to strike the enhancements, and the aggregate term does not appear to include the one-year enhancements.

natural and probable consequence doctrine if a ""reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted."" (*Id.* at p. 162.) As an example, if a person "'aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault.'" (*Id.* at p. 161.)

In *Chiu*, the Supreme Court held that the natural and probable consequences theory of aider and abettor liability cannot be relied on to convict a defendant of first degree premeditated murder. (*Chiu, supra*, 59 Cal.4th at p. 167.) The mental state required for first degree murder "is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." (*Id.* at p. 166.) Thus, under the natural and probable consequences theory, "the connection between the [aider and abettor's] culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder . . . ." (*Ibid.*) However, under *Chiu*, "[a]iders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles." (*Ibid.*)

2. *Appropriate remedy to correct* Chiu *error*

As the Supreme Court held in *Chiu*, when the trial court instructs the jury on aider and abettor liability under both the direct and the natural and probable consequences theories of guilt, one of which was legally correct and one legally incorrect,

the "first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Chiu, supra*, 59 Cal.4th at p. 167.) In *In re Martinez* (2017) 3 Cal.5th 1216, 1218, the Supreme Court applied the same analysis to a petition for a writ of habeas corpus, explaining, "We hold that on a petition for writ of habeas corpus, as on direct appeal, *Chiu* error requires reversal unless the reviewing court concludes beyond a reasonable doubt that the jury actually relied on a legally valid theory in convicting the defendant of first degree murder."

In *Chiu*, the Court of Appeal concluded the record did not support direct aider and abettor liability, and on that basis "reversed the first degree murder conviction, allowing the People to accept a reduction of the conviction to second degree murder or to retry the greater offense." (*Chiu, supra*, 59 Cal.4th at p. 168.) As the *Chiu* court explained, "That disposition is also appropriate under our decision. If the People choose to retry the case, they may seek a first degree murder conviction under a direct aiding and abetting theory." (*Ibid.*) In *Martinez*, the Supreme Court issued a similar order upon finding error: "[W]e . . . remand with directions to enter an order granting Martinez habeas corpus relief and vacating his conviction for first degree murder. If the prosecution elects not to retry Martinez, the trial court shall enter judgment reflecting a conviction of second degree murder and sentence him accordingly." (*In re Martinez, supra*, 3 Cal.5th at p. 1227; accord, *In re Loza, supra*, 27 Cal.App.5th at p. 808 ["[Defendant's] conviction for first degree murder is vacated. If, after the filing of the remittitur, the prosecution does not retry Loza solely on the premeditation and deliberation element of

murder . . . the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a conviction of second degree murder and shall resentence Loza accordingly."].)

In this case, the People conceded in the superior court that Chavez's conviction of first degree murder was based only on the natural and probable consequences theory of aider and abettor liability. The superior court ordered the identical remedy imposed by the Supreme Court in *Chiu* and *In re Martinez*, ordering: "[T]he judgment of conviction for first degree murder is VACATED . . . . Pursuant to *Chiu*, the People may either accept a reduction of the conviction to second degree murder, or elect to retry [Chavez] for first degree murder under a legally valid theory . . . ."

Chavez contends the superior court violated his Sixth Amendment right to a jury trial by vacating his conviction for first degree murder, then entering a second degree murder conviction without first affording him a jury trial on whether he should be convicted of second degree murder. But the court followed the procedure the Supreme Court established in *Chiu* and *In re Martinez*, and we are bound by this precedent. (*K.R. v. Superior Court* (2017) 3 Cal.5th 295, 308 ["'[I]t is established that a holding of the Supreme Court binds all of the lower courts in the state, including an intermediate appellate court'"]; *People v. Johnson* (2012) 53 Cal.4th 519, 527-528 [decisions of Supreme Court are binding on appellate courts].)

Moreover, the remedy the Supreme Court ordered in *Chiu* and *In re Martinez* reflects the appellate courts' "broad discretion to formulate a remedy that is tailored to redress the particular constitutional violation that has occurred." (*People v. Booth*

(2016) 3 Cal.App.5th 1284, 1312.) By vacating the judgment as to first degree murder to permit the People an opportunity to retry Chavez on a valid theory of first degree murder, the superior court did not relinquish its authority to modify the judgment to reflect a conviction of second degree murder, because second degree murder is a lesser included offense of first degree murder where both are based on the same theory of liability. (*In re Figueroa* (2018) 4 Cal.5th 576, 589 ["The parties agree that second degree murder is a lesser included offense of first degree murder."]; *People v. Taylor* (2010) 48 Cal.4th 574, 623 (*Taylor*) [noting it was "settled" law that second degree murder is a lesser included offense of first degree murder, but concluding second degree implied malice murder was not a lesser included offense of first degree felony murder]; *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1237 [trial court properly instructed the jury on second degree murder as a lesser included offense of premeditated murder].)

Here, unlike *Taylor*, the People's theory of both first and second degree murder was based on the natural and probable consequences theory of aider and abettor liability. Thus, the only difference between a conviction of first and second degree murder in this case was whether Rodriguez acted with premeditation and deliberation (*Taylor, supra*, 48 Cal.4th at p. 623 ["'Second degree murder is the unlawful killing of a human being with malice, but without the additional elements . . . that would support a conviction of first degree murder.'"], and under these circumstances, second degree murder is a lesser included offense of first degree murder.

"When a greater offense must be reversed, but a lesser included offense could be affirmed, we give the prosecutor the

option of retrying the greater offense, or accepting a reduction to the lesser offense." (*People v. Kelly* (1992) 1 Cal.4th 495, 528; accord, *People v. Edwards* (1985) 39 Cal.3d 107, 118 [conviction tainted by error was reversed, but the prosecution had the option to retry the defendant on the same charges or accept entry of judgment for lesser included offenses because "it does not necessarily follow that the judgment must be unconditionally reversed"]; *People v. Richards* (2017) 18 Cal.App.5th 549, 560-561 [same].)[8]

The cases cited by Chavez in which the courts ordered a retrial following the grant of a habeas corpus petition that vacated the conviction are distinguishable. In each case, the court vacated the conviction based on an error that affected the validity of the verdict under any theory of liability. (See, e.g., *People v. Cooper* (2007) 149 Cal.App.4th 500, 506-507 [writ of habeas corpus granted and defendant afforded new trial where admission of testimony violated confrontation clause]; *In re Cruz* (2003) 104 Cal.App.4th 1339, 1346 [trial court should have ordered retrial after it granted defendant's writ petition based on new evidence that defendant may not have been the shooter in murder case].)[9] Here, the error affected only the degree of the murder conviction.

---

[8] We reject Chavez's contention the remedy imposed violated the separation of powers by deferring to the prosecution whether Chavez should be convicted of first or second degree murder. Under *Chiu*, the People were entitled to an opportunity to retry the first degree murder charge under a valid theory of liability, or if they declined to retry the case, to a conviction of second degree murder.

[9] Chavez's contention the holdings in *Chiu* and *In re Martinez* are inconsistent with United States Supreme Court

B. *There Was Sufficient Evidence To Support Chavez's Second Degree Murder Conviction*

Chavez contends there was insufficient evidence to support a conviction for second degree murder under a natural and probable consequences theory. However, as Chavez concedes, we previously concluded in *Chavez I* sufficient evidence supported his first degree murder conviction under a theory of natural and probable consequences. (*Chavez I, supra*, B216450.) As we explained, the evidence supported a finding "the shooting was a natural and probable consequence of the assault and attempted robbery of Maszano" because Chavez "knowingly participated in a fight with Maszano that escalated into a deadly shooting by one of [Chavez's] fellow gang members." (*Ibid.*) Because we determined the evidence supported a conviction of first degree murder, the same evidence necessarily supports a conviction of the lesser included offense of second degree murder.[10]

Finally, Chavez urges us to extend the Supreme Court's holding in *People v. Chun* (2009) 45 Cal.4th 1172, 1178, which

---

precedent on the Fifth Amendment's prohibition against double jeopardy lacks merit. (See, e.g., *Lockhart v. Nelson* (1988) 488 U.S. 33, 42; *Green v. United States* (1957) 355 U.S. 184, 189-192; *People v. Cooper, supra*, 149 Cal.App.4th at p. 522.) The cited cases did not address whether, after a finding of error in a defendant's conviction of a greater offense, the proper remedy was to vacate the conviction and enter a conviction of the lesser included offense if the prosecution elected not to retry the defendant for the greater offense.

[10] Because we conclude sufficient evidence supports the second degree murder conviction, we do not reach the People's contention Chavez's argument is beyond the scope of this appeal.

held a second degree felony-murder conviction cannot be based on an assaultive crime, to bar a second degree murder conviction based on the natural and probable consequences doctrine. However, the Supreme Court in *Chiu* could have extended *Chun* to convictions based on the natural and probable consequences doctrine, but it did not. (*Chiu, supra*, 59 Cal.4th at p. 166.) We are bound by this precedent. (*K.R. v. Superior Court, supra*, 3 Cal.5th at p. 308; *People v. Johnson, supra*, 53 Cal.4th at pp. 527-528.)

C. *Chavez May Only Seek Relief Under Senate Bill No. 1437 by Filing a Petition in the Trial Court*

1. *Senate Bill No. 1437*

On September 30, 2018 Senate Bill No. 1437 was signed into law, effective January 1, 2019. Senate Bill No. 1437 was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Sen. Bill No. 1437 (2017-2018 Reg. Sess.) § 1; see *People v. Martinez* (2019) 31 Cal.App.5th 719, 723.) ". . . Senate Bill 1437 accomplishes this by amending section 188, which defines malice . . . ." (*People v. Martinez*, at p. 723.)

As discussed, prior to the enactment of Senate Bill No. 1437, second degree murder could be committed by aiding and abetting a target offense, the natural and probable consequences of which could result in death. (*In re Martinez, supra*, 3 Cal.5th at p. 1220.) Effective January 1, 2019, Senate

Bill No. 1437 amended section 188 to add, "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime."

The legislation also added section 1170.95, which provides a procedure for people convicted of murder to petition the trial court for retroactive relief if the changes in the law affect their previously sustained convictions. (Sen. Bill No. 1437 (2017-2018 Reg. Sess.) § 4.) Section 1170.95, subdivision (a), provides, "A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial . . . . [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." Section 1170.95, subdivision (b)(1), provides that the petition "shall be filed with the court that sentenced the petitioner."

Pursuant to section 1170.95, subdivision (b)(1)(A), the petition must include a declaration by the petitioner that he or she is eligible for relief under the section. Upon receipt of the petition, the trial court must determine if the petitioner has made a prima facie showing he or she falls within the provisions

of the section. (§ 1170.95, subd. (c).) If the petitioner has made such a showing, the trial court "shall issue an order to show cause." (*Ibid*.) The trial court must hold a hearing within 60 days from issuance of the order to show cause "to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not . . . previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (§ 1170.95, subd. (d)(1).) If a hearing is held, "[t]he prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (§ 1170.95, subd. (d)(3).) "[T]he burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges." (*Ibid*.)

2. *Retroactivity of Senate Bill No. 1437*

Chavez contends the Legislature intended that Senate Bill No. 1437 apply retroactively to Chavez's sentence, citing to the Supreme Court's holding in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). In *Estrada*, the Supreme Court held that when the Legislature amends a statute to reduce the punishment for a criminal offense, the amended statute is presumed to apply to all defendants whose judgments were not yet final on the statute's operative date, unless the Legislature clearly states to the contrary. (*Id.* at p. 744.) In two recent cases, however, the

Supreme Court concluded as to Proposition 47 (the Safe Neighborhoods and Schools Act; § 1170.18) and Proposition 36 (the Three Strikes Reform Act of 2012; § 1170.126) the procedures under the initiatives for petitioning the trial court were the exclusive means of obtaining retroactive relief in light of the initiatives' detailed procedures for petitioning for retroactive relief. (See *People v. DeHoyos* (2018) 4 Cal.5th 594, 603 (*DeHoyos*) [". . . Proposition 47 is an ameliorative criminal law measure that is 'not silent on the question of retroactivity,' but instead contains a detailed set of [recall and resentencing] provisions designed to extend the statute's benefits retroactively."]; *People v. Conle*y (2016) 63 Cal.4th 646, 657 (*Conley*) ["[A] similar set of interpretive considerations [in prior cases] persuades us that the voters who passed [Proposition 36] did not intend to authorize automatic resentencing for third strike defendants serving nonfinal sentences imposed under the former version of the Three Strikes law."].)

Our colleagues in Division Five recently applied the reasoning in *Conley* and *DeHoyos* to the question of retroactivity of Senate Bill No. 1437, concluding "the Legislature intended convicted persons to proceed via section 1170.95's resentencing process rather than avail themselves of Senate Bill 1437's ameliorative benefits on direct appeal." (*People v. Martinez, supra*, 31 Cal.App.5th at p. 728; accord, *In re R.G.* (2019) 35 Cal.App.5th 141, 151 [declining to consider request for relief from second degree murder conviction under Sen. Bill No. 1437 on direct appeal without prior § 1170.95 petition]; *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1158 (*Anthony*) [same].)

As the court in *People v. Martinez* explained, "The analytical framework animating the decisions in *Conley* and

DeHoyos is equally applicable here. Like Propositions 36 and 47, Senate Bill 1437 is not silent on the question of retroactivity. Rather, it provides retroactivity rules in section 1170.95. The petitioning procedure specified in that section applies to persons who have been convicted of felony murder or murder under a natural and probable consequences theory. It creates a special mechanism that allows those persons to file a petition in the sentencing court seeking vacatur of their conviction and resentencing. In doing so, section 1170.95 does not distinguish between persons whose sentences are final and those whose sentences are not. That the Legislature specifically created this mechanism, which facially applies to both final and nonfinal convictions, is a significant indication Senate Bill 1437 should not be applied retroactively to nonfinal convictions on direct appeal." (*People v. Martinez, supra*, 31 Cal.App.5th at p. 727; accord, *Anthony, supra*, 32 Cal.App.5th at p. 1152.)

We agree with the reasoning of the courts in *People v. Martinez*, *In re R.G.*, and *Anthony*, and likewise conclude the exclusive remedy for Chavez to obtain relief under Senate Bill No. 1437 is to petition for relief under the detailed procedure set forth in section 1170.95.

D. *Remand for Resentencing Is Necessary Pursuant to Section 12022.53, Subdivision (h)*

Chavez contends, the People concede, and we agree remand is appropriate for the trial court to exercise its discretion whether to strike the firearm enhancements to Chavez's sentence imposed pursuant to section 12022.53, subdivisions (d) and (e)(1).

In 2017 the Governor signed into law Senate Bill No. 620 (2017-2018 Reg. Sess.), which went into effect on January 1,

2018. Senate Bill No. 620 amended section 12022.53, subdivision (h), to give trial courts discretion to strike firearm enhancements under this section in the interest of justice. (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.) Section 12022.53, subdivision (h), provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

The People concede section 12022.53, subdivision (h), as amended, applies retroactively to Chavez, whose sentence was not final at the time the provision came into effect. (See *People v. Hurlic* (2018) 25 Cal.App.5th 50, 56; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424.) Given the People's concession and the nature of the offense, remand is necessary to allow the trial court to exercise the discretion it did not have at the time of sentencing.[11]

---

[11] On remand, if the trial court declines to strike the firearm enhancement under section 12022.53, subdivisions (d) and (e)(1), because Chavez was a principal (not the shooter), the court should strike the gang enhancement on the same count pursuant to section 12022.53, subdivision (e)(2). If the trial court exercises its discretion to strike the firearm enhancement, it may impose a gang enhancement, but the 15-year minimum parole eligibility term under section 186.22, subdivision (b)(5), would apply, which is applicable to crimes punishable by life terms, not the 10-year enhancement for violent felonies under section 186.22, subdivision (b)(1)(C). (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004.)

DISPOSITION

The judgment of conviction is affirmed. We reverse the sentence, and remand with directions for the trial court to exercise its discretion whether to impose or strike the firearm enhancements imposed pursuant to section 12022.53, subdivisions (d) and (e)(1), and to resentence Chavez.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.